SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1247

FRANKLIN NIX, *Petitioner,*

v.

THE GRAND LODGE OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 452 F.2d 794 (Pet. 1C-7C). The opinions of the District Court, originally and on rehearing, are reported respectively at 78 LRRM 2915, 2919 (Pet. 1A-11A, 1B-8B). The opinions of the National Labor Rela-

tions Board and the Court of Appeals in a companion unfair labor practice proceeding are reported respectively as *International Association of Machinists and Aerospace Workers, AFL-CIO*, 172 NLRB No. 239, 69 LRRM 1148 (1968), and *Nix* v. *N.L.R.B.*, 418 F.2d 1001 (C.A. 5, 1969).

QUESTION PRESENTED

In an unfair labor practice proceeding in which the employee participated or had the opportunity to participate in full, the National Labor Relations Board found, with the affirmance of the Court of Appeals on judicial review, that the employee had been discharged by his union-employer for pilfering documents from his superior and not for his union activity. The question presented is whether the employee as to the identical discharge is collaterally estopped from claiming in a later action brought by him in a United States District Court that the basis for his discharge was that he had exercised his free speech rights guaranteed him by Section 101(a)(2) of the Labor Management Reporting and Disclosure Act of 1959.

STATEMENT

On August 31, 1966, Petitioner Franklin W. Nix was discharged by Respondent International Association of Machinists and Aerospace Workers (the Union) from his position as a Press Representative of the Union (AI 39[1]). On September 6, 1966, Nix filed an unfair labor practice charge with the National Labor Relations Board claiming that he had been dis-

[1] "AI" refers to the printed appendix before the Court of Appeals in the unfair labor practice proceeding.

missed because of his union activity (AI 4-7). On November 8, 1966, based on his charge, the NLRB General Counsel issued a complaint alleging that Nix had been discharged "because of his membership in and activities on behalf of" a labor organization known as the IAM Representatives Association (AI 11, 9). On November 18, 1966, in answer to that complaint, the Union averred that Nix had been discharged for "stealing property of the . . . Union as well as the personnel effects of his immediate superior . . ." (AI 15-16).

A five-day hearing on the complaint was held in the latter part of April 1967 (AI 36), devoted in major part to Nix's discharge. The NLRB Rules and Regulations provide, then as now, that a "party" shall include "any person filing a charge" (§ 102.8); that "'[a]ny party shall have the right to appear at such [unfair labor practice] hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record documentary or other evidence" (§ 102.38); and that any party "may also submit briefs, engage in oral argument, and submit proposed findings and conclusions to the trial examiner" (§ 101.10(a)). *International Union, UAW* v. *Scofield,* 382 U.S. 205, 219 (1965).

At the hearing Nix testified in support of his claim that he had been discharged for his union activity, and his direct and cross-examination pertaining to the reason for his discharge consumed 119 pages (AI 256-375). Other witnesses testified for and against him on this question, and a mass of documentary evidence pro and con relevant to it was introduced. Lengthy briefs supporting and opposing Nix's position were

filed with the NLRB Trial Examiner after the close of the hearing.

On September 8, 1967, the Trial Examiner issued his decision (AI 36-109), of which 24 pages were devoted to Nix's discharge (AI 39-63). The examiner concluded that Nix had pilfered documents from his superior; that "pilfering of documents by employees is . . . serious misconduct;" and that the Union had "discharged Nix because of his misconduct" (AI 60-63).

Nix and the NLRB General Counsel filed exceptions to the Trial Examiner's decision with the NLRB (AI 120-155). Nix detailed his exceptions in 31 pages (AI 124-155). He filed four post-hearing motions with the NLRB (AI 156, n. 1). Briefs supporting and opposing his position were filed with the NLRB. The NLRB affirmed the examiner's decision with respect to Nix (AI 157-158, 171-172).

Nix petitioned the Court of Appeals for the Fifth Circuit to review the NLRB's decision. On November 19, 1969, after complete review, the Court of Appeals affirmed the NLRB. *Nix* v. *N.L.R.B.*, 418 F.2d 1001. It carefully summarized the facts and fully analyzed the basis for the NLRB's holding, "affirming the trial examiner's finding, . . . that Nix was discharged for pilfering documents from his superior at IAM and not because of his union membership and activity" (418 F.2d at 1005). It concluded that (*id.* at 1010):

> We hold that substantial evidence on the record considered as a whole supports the Board's finding that . . . Nix . . . [was] discharged for cause and not because of . . . [his] union membership and activity. Nix's discharge for pilfering his

> superior's personal papers . . . [was] legitimate grounds for discharge. The Board properly concluded that the General Counsel failed to sustain his burden of proof that the discharge of . . . Nix . . . was only a pretext to conceal dismissal for membership and activities in IAM's staff representatives' Association. The Board's finding that Nix . . . [was] discharged for legitimate reasons is a reasonable inference easily within the Board's power to draw. As recently stated by this Court, " 'the evidence of legitimate motive by the employer is sufficiently compelling that implications of illegality cannot control [these discharges] * * *.' "

On June 3, 1970, subsequent to the decision of the Court of Appeals, Nix filed a complaint with the United States District Court for the Northern District of Georgia bringing into issue the basis for the identical discharge, Nix this time claiming that the Union "acted maliciously, wantonly, and in reckless disregard of . . . [his] membership rights in disciplining . . . [him] by terminating his employment . . . for exercising rights secured to him by Section 101(a)(2) of . . . [the Labor Management Reporting and Disclosure] Act, and such discipline is unlawful under the provisions of Section 609 of said Act" (AII 72[2]). The Union moved to dismiss the complaint "upon principles of collateral estoppel," averring that Nix had "fully litigated the cause of action sought to be alleged . . . . before the National Labor Relations Board", and requesting that "the Court take notice of the decision of the United States Court of Appeals for the Fifth Circuit in . . . *Nix* v. *National Labor*

[2] "AII" refers to the printed appendix before the Court of Appeals on the instant appeal.

Relations Board, 418 F.2d 1001. Plaintiff is estopped from relitigating the legal and factual issues and the cause of action litigated in that proceeding" (AII 84-85). Nix did not respond to this motion. On August 12, 1970, the District Court dismissed the complaint on the ground that "the controlling issue of fact . . . has been determined adversely to the plaintiff in a prior proceeding, and that under principles of collateral estoppel, that determination precludes recovery here" (Pet. 8A, AII 28). The District Court explained that (Pet. 8A, AII 28-29):

> When the plaintiff was fired, he filed unfair labor practice charges with the NLRB, alleging a discriminatory discharge in violation of Section 8(a)(1) and 8(a)(3) of the National Labor Relations Act . . . . However, the Board found as a matter of fact that Nix had been discharged for pilfering documents from his superior at IAM. Nix v. N.L.R.B., 418 F.2d 1001, 1005 (5th Cir. 1969. On petition for review of the Board's decision, the Court of Appeals affirmed that finding of fact by ruling that there was substantial evidence to support the Board's finding that Nix was discharged "for cause." Nix v. N.L.R.B., 418 F.2d 1001, 1010 (5th Cir. 1969).
>
> . . . [U]nder the principles of collateral estoppel, the Board's finding of fact—made after an adversary hearing and upheld on judicial review—controls the issue of the reasons Nix was fired.

Nix moved the District Court for reconsideration (AII 46-54), claiming that "determination of the issue of estoppel . . . has deprived . . . [him] of due process of law on this issue" (AII 53), but not particularizing in any concrete way any specific reason for not estop-

ping him. On November 16, 1970, the District Court rendered an opinion adhering to its decision (Pet. 1B, 5B-6B, AII 54, 58-60), and rejecting Nix's abstract claim that "he has not had an adequate opportunity to be heard on this issue" (Pet. 6B, AII 60).

On appeal, the Court of Appeals affirmed, agreeing with the District Court that "the controlling issues of fact surrounding plaintiff's dismissal from his employment with the Grand Lodge [Union] were determined adversely to plaintiff in a prior proceeding before the National Labor Relations Board which was affirmed by this court. . . ," and this "earlier determination" precludes "recovery" by Nix on his present claim (Pet. 5B-5C).

ARGUMENT

No question meriting review is presented, no conflict of decision exists, and the petition should therefore be denied.

"When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose."[3] Collateral estoppel effect has been given to findings of the NLRB,[4] as to findings of other administrative agen-

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[3] *United States* v. *Utah Construction and Mining Co.*, 384 U.S. 394, 422 (1966).

[4] *E.g., Painters District Council No. 38* v. *Edgewood Contracting Co.*, 416 F.2d 1081 (C.A. 5, 1969); *H. L. Robertson & Associates* v. *Plumbers Local Union No. 519*, 429 F.2d 520 (C.A. 5, 1970); *Paramount Transport Systems* v. *Teamsters Union*, 436 F.2d 1064 (C.A. 9, 1971).

cies.[5] There is no reason in principle why collateral estoppel should not apply.

To invoke collateral estoppel notice of the defense must be given the opposing party in order to afford him a "chance to argue, if he can, why the imposition of an estoppel would be inappropriate."[6] Petitioner was informed from the first that the plea was being invoked against him (*supra*, pp. 5-6). Yet he has never articulated a single concrete reason why he should not be estopped. Neither before the District Court, the Court of Appeals, nor in this Court has he particularized or substantiated any basis in fairness for according him a second opportunity to litigate the factual cause for his discharge.

Petitioner baldly asserts, without the slightest attempt to substantiate the claim at any point in any court, that he was not permitted to participate in the hearing before the examiner (Pet. 17). But he obviously had the right to participate as a party as fully as he chose (*supra*, p. 3), and he elected instead to have his interest at the hearing prosecuted by the NLRB General Counsel.[7] He was represented at the

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[5] *Tampa Phosphate R. Co.* v. *Seaboard Coast Line R. Co.*, 418 F.2d 387 (C.A. 5, 1969); *Seguros Tepejac, S.A.* v. *Jernigan*, 410 F.2d 718 (C.A. 5, 1969).

[6] *Blonder-Tongue Laboratories* v. *University of Illinois Foundation*, 402 U.S. 313, 350 (1971).

[7] "When the General Counsel issues a complaint and the proceeding reaches the adjudicative stage, the course the hearing will take is in the agency's control, but the charging party is accorded formal recognition: he participates in the hearings as a "party", he may call witnesses and cross-examine others, may file exceptions to any order of the trial examiner, and may file a petition for reconsideration to a Board order . . . ." *International Union, UAW* v. *Scofield*, 382 U.S. 205, 219 (1965).

hearing fully, diligently, and energetically; he does not show what, if anything, was done or omitted at the hearing that worked to his disadvantage, or what would or could have changed the result; he does not claim that any evidence was not adduced that should have been, or that any was adduced that should not have been. His assertion of prejudice is altogether abstract. Furthermore, the NLRB General Counsel properly acted for Petitioner at the hearing, and "[w]here a judgment is rendered in an action in which a party thereto properly acts on behalf of another, the other is bound by or entitled to the benefits of the rules of res judicata with reference to such of his interests as at the time are controlled by the party to the action." Restatement, Judgments, § 85(1)(a) (1942).

Indeed, Petitioner explicitly disclaims any desire to show the existence of any circumstances which would establish that he is not appropriately estopped by the NLRB finding (Pet. 19). He seeks instead an absolute rule that, "as a matter of law, . . . an NLRB adjudication of a union member's unfair labor practice charges is not a bar to such member's subsequent action in district court to enforce his rights under the LMRDA" (Pet. 19-20). And his reason is that the NLRB in enforcing the National Labor Relations Act has no jurisdiction to adjudicate claims arising under the Labor Management Reporting and Disclosure Act (LMRDA) (Pet. 12-15). But Petitioner patently misses the point. The NLRB is clearly empowered, in the enforcement of the National Labor Relations Act, to find the cause of an employee's discharge, and in this case it found that Petitioner was discharged for pilfering documents from his superior. That finding,

within the competence of the NLRB to make, conclusively establishes the reason for his discharge, and refutes any claim that he was dismissed in violation of his statutory rights, whether under the National Labor Relations Act or the Labor Management Reporting and Disclosure Act.

In short, one five-day hearing on the reason for Petitioner's discharge is enough. Petitioner is not entitled to a second five-day hearing in an effort to persuade another trier that he was not fired for pilfering documents. "In the present case the Board was acting in a judicial capacity when it considered . . . [Petitioner's] claims, the factual disputes resolved were clearly relevant to issues properly before it, and both parties had a full and fair opportunity to argue their version of the facts and an opportunity to seek court review of any adverse findings. There is, therefore, neither need nor justification for a second evidentiary hearing on these matters already resolved as between these two parties." *United States* v. *Utah Construction and Mining Co.*, 384 U.S. 394, 422 (1966).

CONCLUSION

For the reasons stated the petition for a writ of certiorari should be denied.

Respectfully submitted,

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April, 1972

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PETITIONER'S REPLY MEMORANDUM

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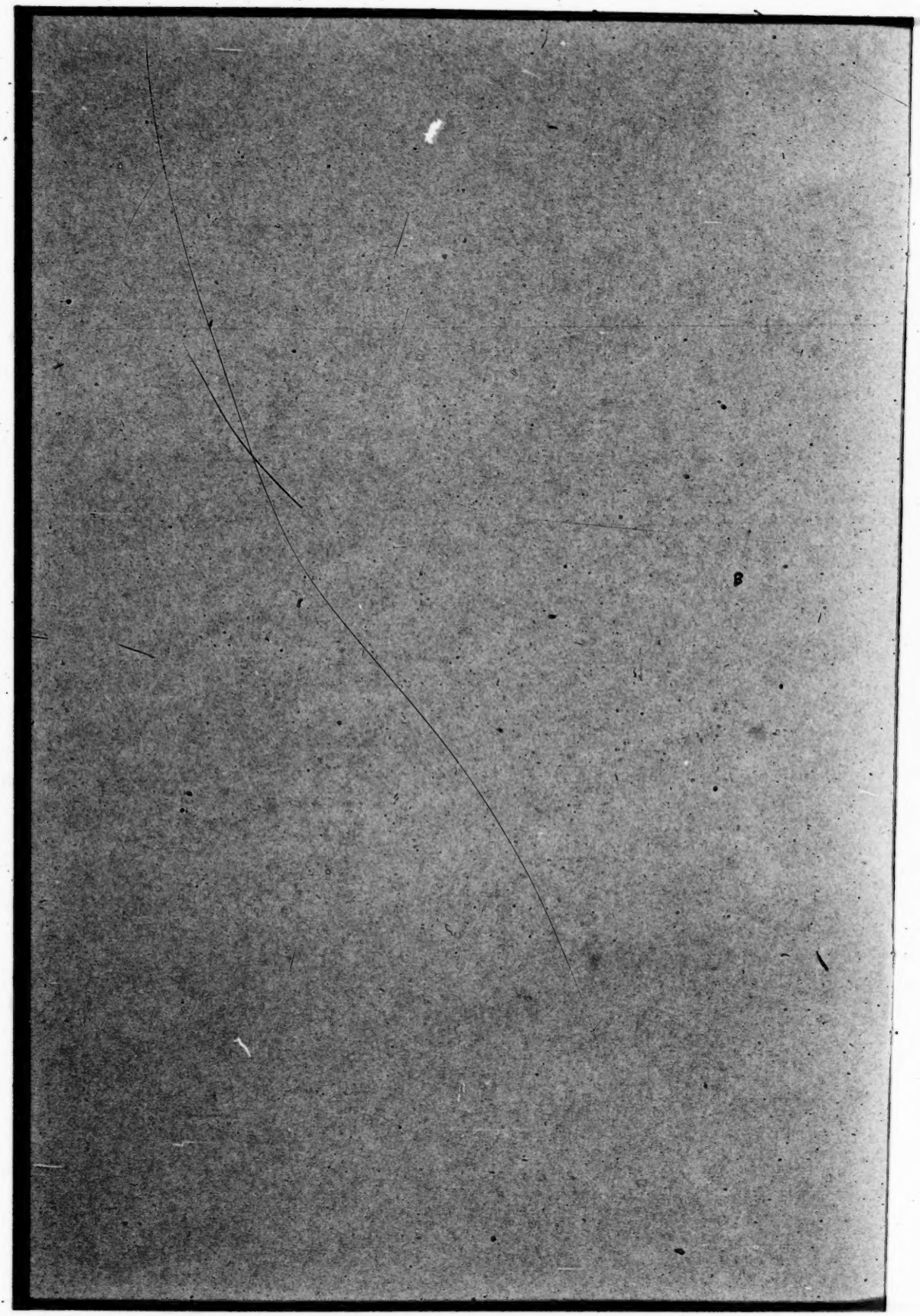

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PETITIONER'S REPLY MEMORANDUM

There is nothing "abstract" (Brief in Opp., p. 7) about Petitioner's allegation that he has not been afforded procedural due process. When Respondent filed its bare motion to dismiss on the ground, *inter alia*, of collateral estoppel, a motion supported only by a